THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-01907-KLM

CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, a municipal corporation of the State of Colorado,

Plaintiff,

v.

BOULDER COUNTY, ACTING BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS, a body corporate and politic of the State of Colorado, and MATT JONES, CLAIRE LEVY, and MARTA LOACHAMIN, in their official capacity as Commissioners,

Defendants.

MOTION TO DISMISS

Defendants, the Board of County Commissioners of Boulder County, Matt Jones, Claire Levy, and Marta Loachamin, in their official capacities ("the County"), request that the Court dismiss this case under F.R.C.P. 12(b)(6). In support, the County states as follows:

CONFERRAL

Conferral under D.C.COLO.LCivR 7.1 (b)(2) is excepted. Nonetheless, the County's counsel conferred with counsel for Denver, who indicated Denver opposes the motion.

BACKGROUND AND RELEVANT FACTS

This case involves the same parties, the same property, the same project, and the same county regulations as a case already litigated to final judgment in state court.

On April 11, 2019, the City and County of Denver, acting by and through its Board of Water Commissioners ("Denver") filed suit in Boulder District Court against Boulder County, acting by and through its Board of County Commissioners. (State Court Compl., Ex. 1[1]; *see* Compl. ¶ 77.) Denver argued in the state court action that its proposed hydropower project at Gross Dam in Boulder County was not subject to County regulation under Article 8 of the Boulder County Land Use Code (known as "1041 regulations" and resulting in "1041 permits") because of a state statutory exception. (State Court Compl, Ex.1.) On December 27, 2019, the state court issued a final judgment, finding that "the Expansion Project is subject to Boulder County's permitting authority and regulation process." (Ruling and Order, Ex. 2 at 6; Compl. ¶ 79.)

Before it filed its state court complaint, Denver asserted the project required a Federal Power Act ("FPA") hydropower license from the Federal Energy Regulatory Commission ("FERC") and had applied for a FERC license amendment. (Compl. ¶¶ 6-7, 58.) In fact, Denver contends that "[f]or many years" it "was willing to . . . secure and comply with a 1041 permit *even while believing that no such permit could lawfully be required*." (*Id*. ¶ 74 (emphasis added).) It claims the reason it applied for a County permit was "[t]o be a good citizen . . ." (*Id.*) Nonetheless, Denver sued the County in state court to avoid 1041 regulation. The state court disagreed with Denver's position.

Despite the same parties previously devoting substantial resources to the state court lawsuit, Denver now files suit in this Court seeking the same remedy it sought in

[1] The Court may take judicial notice of state court records and files. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006); *Rose v. Utah State Bar*, 471 F. App'x 818, 820 (10th Cir. 2012).

the state court: preventing the County from exercising its 1041 regulatory authority over Denver's Gross Dam expansion project. (*See* Compl. at 32 ¶¶ 1-2.) Although based on a different legal theory, this lawsuit seeks the same relief against the same parties as Denver's prior, unsuccessful lawsuit. As discussed below, the Court should give full faith and credit to the state court judgment and dismiss this case based on claim preclusion.

STANDARD OF REVIEW

Under Rule 12(b)(6), the Court may dismiss a complaint if it fails to "state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Claim preclusion is an affirmative defense that may be raised in a motion to dismiss. *Fowler v. Utah*, 744 F. App'x 590, 591 n.2 (10th Cir. 2018).

ARGUMENT

The Court should dismiss the case based on claim preclusion.

Claim preclusion, or res judicata, generally prohibits the splitting of actions and "force[s] a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the first suit." *Stone v. Dep't of Aviation,* 453 F.3d 1271, 1279 (10th Cir. 2006). "The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, 28 U.S.C. § 1738, which directs a federal court to refer to the preclusion law of the State in which judgment was rendered." *Brady v. UBS Fin. Servs., Inc.,* 538 F.3d 1319, 1327 (10th Cir. 2008).

Under Colorado law, claim preclusion "prevents parties from relitigating claims that were or could have been litigated in a prior proceeding." *Gale v. City & Cnty. of Denver*, 2020 CO 17, ¶ 14. Claim preclusion applies when four elements are met: (1) the judgment in the prior proceeding was final; (2) the prior and current proceedings involved the identical subject matter; (3) the prior and current proceeding involved identical claims for relief; and (4) parties to the proceedings were identical or in privity with one another." *Id.* Claim preclusion applies in this case because Denver previously sued the County in state court over the same issue and it could have raised its claim that the County's application of its 1041 regulations is preempted by federal law.

1. The Boulder District Court issued a final judgment.

The Ruling and Order in the state court case was final. Denver filed a Notice of Appeal in the Colorado Court of Appeals, which stated that: "Denver Water appeals the district court's December 27, 2019 Ruling and Order . . . [t]he order on appeal resolved all issues pending before the district court." (Notice of Appeal, Ex. 3 at 2.) The Colorado Court of Appeals later dismissed Denver's appeal with prejudice, which resulted in the December 27, 2019 Ruling and Order becoming the final judgment in the state court case. (Mandate, Ex. 4.)

2. Both court cases involve the same subject matter.

The prior and current proceedings involve the identical subject matter: the application of Boulder County's 1041 regulations to the Gross Dam expansion project. In its state court complaint, Denver alleged that it owned and operated the Gross Dam and Reservoir in Boulder County, which was originally constructed "pursuant to a

license issued by the Federal Energy Regulatory Commission." (State Court Compl., Ex. 1 ¶¶ 8-9.) Denver further alleged that it was moving forward with plans "to raise the dam . . . and to expand the storage capacity of the reservoir . . ." which it called the "Expansion." Finally, Denver alleged that the county commissioners made a "final decision on whether Denver Water is required to apply to the County for a 1041 permit for the Expansion." (*Id.* ¶ 32.) And, "[a]s a result of the Commissioners' decision, Denver Water must either obtain the [1041] permit or the Expansion may not proceed." (*Id.*)

Likewise, Denver alleges in its current Complaint that it owns and operates the Gross Reservoir and Dam, which is subject to a FERC license. (Compl. ¶¶ 1, 6.) It further alleges that it wishes to undertake the expansion of Gross Reservoir and Dam (again referred to as the "Expansion Project"). (*Id.* ¶ 5.) Finally, Denver alleges that "Boulder County cannot require [Denver] to obtain a 1041 permit as a precondition for beginning construction on the Expansion Project." (*Id.* ¶ 16.) Thus, there can be little doubt that the lawsuits involve the same subject matter.

3. *The claim is the same as a claim that could have been brought at the first proceeding.*

The third element of claim preclusion "requires a court to determine whether the claim at issue in a second proceeding is the same claim that was *or that could have been* brought in the first proceeding." *Gale*, ¶ 15; *Stone*, 453 F.3d at 1279. As discussed below, the state court judgment against Denver has a preclusive effect in federal court, and Denver could have brought its federal claim when it filed its state court action.

A. A prior state court judgment precludes later federal court litigation involving the same issue.

Even where the first proceeding involves state law claims in state court, claim preclusion bars federal claims regarding the same issue that could have been raised in the first proceeding. For example, in *Gale,* a former employee filed a Colo. R. Civ. P. 106(a)(4) claim in state court against Denver related to his termination. *Gale,* ¶¶ 2-3. The employee also filed a 42 U.S.C. § 1983 claim in federal court alleging violations of his First Amendment rights. *Id.* ¶ 3. The state district court affirmed Gale's termination, and, because of the state court decision, the federal district court dismissed Gale's federal lawsuit based on claim preclusion. On appeal, the Tenth Circuit certified the claim preclusion question to the Colorado Supreme Court. The Colorado Supreme Court concluded that the employee's state court Rule 106(a)(4) proceeding precluded his later federal civil rights claim. *Id.* ¶ 24.

Similarly, Denver's state court lawsuit involved a Rule 106(a)(4) claim against the County in addition to a declaratory judgment claim. (State Court Compl., Ex. 1 at 5.) Denver claimed that a state statutory provision, the zoned land exemption, applied to the expansion and prevented the County from exercising its 1041 authority. Denver has now filed for a declaration under a theory involving federal law, but the prior state court judgment on the identical subject matter results in claim preclusion.

B. Denver could have raised its federal claim in the prior state court lawsuit.

Although Denver did not claim the County's application of its 1041 regulations to the expansion was preempted by the FPA as it does now, it could have. Nothing

prevented Denver from raising FPA preemption in its state court lawsuit. Colorado courts may and do consider federal preemption arguments related to local regulations. For example, in *Banner Advert. v. City of Boulder ex rel. State*, 868 P.2d 1077 (Colo. 1994), a plaintiff argued that a city ordinance that prohibited towed banners on airplanes was federally preempted by the Federal Aviation Act. After a discussion of the applicability of federal preemption to the ordinance, the Colorado Supreme Court concluded that the city's ordinance was preempted by federal law. *Id.* at 1083-85; *see Fuentes-Espinoza v. People,* 2017 CO 98 (federal Immigration and Nationality Act preempted state statute related human smuggling); *Ragan v. Ragan,* 2021 COA 75 (the federal Employee Retirement Income Security Act of 1974 preempted a state statue related to divorce distributions). Thus, the Boulder District Court had jurisdiction to consider Denver's federal preemption arguments related to the County's 1041 regulations if Denver raised them.

Likewise, Denver's current Complaint shows it was aware of the facts giving rise to the federal preemption issue when it filed its state court complaint in 2019. Denver alleges that "[b]ecause Gross Reservoir and Dam occupy federal land specifically set aside for hydropower production, [Denver] cannot operate without an FPA hydropower license from FERC. FERC's predecessor . . . issued an original license for the hydropower project in 1951. Any material changes to facilities within the hydropower project boundary require FERC approval." (Compl. ¶ 6.) Denver further alleges that "[p]reparing to apply for an amendment of the hydropower license from FERC to allow for the expansion of the reservoir took over a decade . . ." and that "Denver Water

ultimately filed its application for a license amendment with FERC in 2016." (*Id.* ¶ 7.) All of this took place *before* Denver filed suit in state court against the County. Thus, Denver could have filed preemption claims prior to filing an application for a 1041 permit from the County. *See Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs.,* 830 P.2d 1045, 1055 (Colo. 1992) (plaintiff may sue for injunctive relief based on preemption if "county regulations pose a present and significant threat to [plaintiff's] legal interest" in development).

FERC ultimately issued a license for the expansion project in July 2020—after Denver initiated its state court lawsuit. However, Denver's preemption claims are not dependent upon FERC's new license issuance. Denver alleges that "[t]he FPA . . . occupies the field of hydropower licensing and regulation . . ."; that "1041 regulation by Boulder County . . . is preempted under a federal statute—the FPA"; and that "Colorado's state law 1041 permitting process . . . is entirely preempted by the FPA." (Compl. ¶¶ 17, 25, 35.) Thus, Denver's claims are based on field preemption. Field preemption applies "where a federal scheme is 'so pervasive as to make reasonable [the] inference that Congress left no room for the States to supplant it.'" *United States v. Draper,* 768 F. App'x 828, 833 (10th Cir. 2019). A field preemption determination requires an analysis of the federal law at issue, in this case the FPA, rather than the contents of the permit. *See First Iowa Hydro-Electric Coop. v. Fed. Power Com.,* 328 U.S. 152 (1946); *California v. FERC,* 495 U.S. 490 (1990) (both undertaking a field preemption analysis of the FPA).

Accordingly, when Denver filed its state court complaint in 2019, it could have alleged that the project was a hydropower project subject exclusively to FERC review and therefore the FPA preempted the County's 1041 regulations. Resolution of the issue would have required an analysis of the FPA in comparison to the County's 1041 regulations. The potential *outcome* of the FERC process—i.e. FERC's 2020 permit for the expansion—would have been irrelevant to the analysis. *See, e.g. Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, (10th Cir. 2004) (ultimate granting or denial of federal agency permit "not relevant" to field preemption inquiry). Accordingly, Denver could have brought its federal field preemption claim when it filed its state court lawsuit in 2019. The state judgement therefore meets the third element of claim preclusion.

4. The parties to the state lawsuit and this lawsuit are the same.

The fourth element of claim preclusion is that the parties to the proceedings were identical or in privity with one another. The captions of the prior judgment and the caption of this case show that the parties to both cases are identical. (*Compare* Ex. 1 to the caption above.) Although the names of the county commissioners in the captions are different due to elections in 2020, it makes no difference because the claims against the commissioners in both cases are official capacity claims. Official capacity claims are claims against the entity defendant, in this case Boulder County. *See Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985) (official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent).

Thus, the parties to both lawsuits are identical and all four elements of claims preclusion are met.

CONCLUSION

A "losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). As shown above, Denver lost its state court lawsuit, and it is not entitled to a rematch. Defendants the Board of County Commissioners of Boulder County, Matt Jones, Claire Levy, and Marta Loachamin in their official capacities, request that this Court dismiss with prejudice all claims.

DATED August 10, 2021.

BOULDER COUNTY ATTORNEY

/s/ David Hughes

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Counsel for Boulder County Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August 2021, I electronically filed the foregoing **MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

jessica.brody@denverwater.org
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Attorneys for Plaintiff

/s/ David Hughes

Exhibit 1

DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO 1777 6th Street Boulder, CO 80302	DATE FILED: April 11, 2019 11:38 AM FILING ID: 236C7110D07C6 CASE NUMBER: 2019CV30350 **▲COURT USE ONLY▲**
Plaintiff: THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, a municipal corporation of the State of Colorado, **v.** **Defendant:** BOULDER COUNTY, ACTING BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS, a body corporate and politic of the State of Colorado, and DEB GARDNER, ELISE JONES, and MATT JONES, in their official capacity.	Case Number: Division:
Jessica R. Brody, General Counsel, No. 35234 Tatiana G. Popacondria, No. 42261 1600 West 12th Avenue Denver, Colorado 80204 Phone Number: 303-628-6460 Fax Number: 303-628-6478 E-mail: Jessica.brody@denverwater.org Tatiana.popacondria@denverwater.org ***Counsel for Plaintiff***	
COMPLAINT FOR RELIEF UNDER C.R.C.P. 106(a)(4) AND FOR DECLARATORY JUDGMENT	

Plaintiff the City and County of Denver, acting by and through its Board of Water Commissioners, a home rule municipality of the State of Colorado ("**Denver Water**"), by and through its undersigned counsel, files this Complaint against Defendant Boulder County, acting by and through its Board of County Commissioners, a body corporate and politic of the State of Colorado, ("**County**") and against Defendants Boulder County Commissioners, Deb Gardner, Elise Jones, and Matt Jones, in their official capacity and for its claims and causes of action states as follows:

PARTIES

1. Denver Water is a municipal utility organized under Article X of the Charter of the City and County of Denver, home rule municipality of the State of Colorado, with the principal place of business at 1600 West 12th Avenue, Denver, Colorado, 80204.

2. The County is a political subdivision of the State of Colorado with the principal place of business at 1325 Pearl Street, Boulder, Colorado, 80302.

3. Deb Gardner, Elise Jones, and Matt Jones together comprise the Board of Boulder County Commissioners ("**Commissioners**"), which entered the decision that Denver Water seeks to have this Court review. The Commissioners are added to this action as defendants in their official capacity only.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over all claims and personal jurisdiction over all parties under C.R.C.P. 106, C.R.C.P. 57, and under Court's general jurisdiction to resolve disputes of this kind.

5. This action is timely filed under C.R.C.P. 106(b), within 28 days of the Commissioners' final decision, which was made by a unanimous voice vote taken on March 14, 2019.

6. Venue is proper in this district pursuant to C.R.C.P. 98(a), because this action affects real property located in Boulder County.

HISTORIC BACKGROUND

7. Denver Water has been supplying drinking water to the people of Denver and neighboring communities for more than 100 years, and presently serves over 1.4 million people.

8. In or about the 1940s, Denver Water acquired a site upon which to construct and operate a dam and a reservoir, now known as the Gross Dam and Reservoir, ("**Gross Project**") to store water from South Boulder Creek and the Fraser River basin for treatment and delivery within its service area. The dam was designed to be constructed in multiple phases, so it could be expanded to increase available water storage capacity based on future need—the engineering documents depicted the facility at its then-contemplated full size of 113,077 acre-feet.

9. In 1955, pursuant to a license issued by the Federal Energy Regulatory Commission, Denver Water completed the first phase of construction, and now operates the 340-foot dam, a 41,811-acre-foot reservoir and a 7,598kW hydroelectric facility.

10. In the early 2000s, Denver Water determined that a greater balance and reliability within its supply system and additional storage capacity were necessary to meet the demands of

existing customers as well as a growing population. Hence, Denver Water began a permitting process to evaluate its options to meet the identified needs. This process screened 303 potential water supply and infrastructure components, yielding 34 well-defined project alternatives. These 34 projects were further evaluated based on their environmental impacts, resulting in five alternatives that were carried forward for analysis in the Draft and Final Environmental Impact Statement. Ultimately, the U.S. Army Corps of Engineers determined that enlarging Denver Water's existing Gross Dam and Reservoir was the environmentally preferable alternative.

11. Therefore, Denver Water is moving forward with the final phase of the construction to raise the dam by 131 feet to a height of 471 feet and to expand the storage capacity of the reservoir from 41,811 acre-feet to about 119,000 acre-feet ("**Expansion**").

GENERAL ALLEGATIONS

12. The Gross Project is located within the unincorporated Boulder County.

13. In 1974, the Colorado General Assembly passed the Activities and Areas of State Interest Act ("**Act**"); commonly referred to as "H.B. 1041." The Act authorizes local governments in Colorado, including Boulder County, to designate areas and activities of state interest and regulate those areas through their respective zoning codes ("**1041 regulations**). Colo. Rev. Stat. § 24-65.1-101, *et seq*.

14. Pursuant to the County's 1041 regulations, located in Articles 8-200 through 8-600 of the Boulder County Land Use Code ("**LUC**"), the "[e]xpansion of any existing reservoir for a municipal or industrial or domestic treated water use" requires a permit from the County. *See* LUC, Article 8, 8-401(D).

15. However, under the Act, a permit is not necessary for any development or activity on land which, as of May 17, 1974 (the effective date of the Act), "has been zoned by the appropriate local government for the use contemplated by such development or activity." C.R.S. §24-65.1-107(1)(c)(II), hereinafter "**Zoned Land Exemption**."

16. On October 12, 2018, Denver Water sent a letter to the County's Director of Land Use ("**Director**") requesting a determination of the applicability of Article 8 of the LUC to the Expansion. Denver Water asserted that the Zoned Land Exemption applies to the Expansion because as of May 17, 1974: (a) the Gross Project was located within the flood regulatory area where "utility facilities such as dams … *shall* be permitted … to the extent that they [were] not prohibited … by any underlying zoning category" (Amendment to County's 1965 Zoning Resolution, Approved August 11, 1969, Section 18.5, 3.4(4)-(6) (emphasis provided)); and (b) the underlying zoning category, Forestry District, did not prohibit dams (Amendment to County's 1965 Zoning Resolution, Approved March 2, 1972, Section VI). Thus, the enactment of the flood regulatory area had the effect of amending the underlying zoning to allow such use.

17. The Director disagreed and denied the exemption request in a letter dated October 22, 2018. The Director opined that the Zoned Land Exemption did not apply because: (a) the

zoning regulation "did not list reservoirs as a permitted use within the Forestry District;" (b) "the property was not in the Flood Regulatory Area;" (c) even if the "property" was within the Flood Regulatory Area, the County required Planning Commission review and approval prior to reservoir development and "no such … review or approval has taken place;" and (d) "even assuming Flood Regulatory Area was in place over Gross Reservoir on May 17, 1984, only a small portion of a very large expansion project could have been within that area."

18. On October 30, 2018, Denver Water filed an appeal requesting reconsideration of the Director's decision. Denver Water's request was based in part on the Director's failure to address the fact that the applicable zoning regulation authorized *dam* construction, which is the primary purpose of the Expansion, but instead focused on whether the *reservoir* was permitted within the applicable zone.

19. On January 18, 2019, the Director affirmed his October 22 decision.

20. In advance of the appeal hearing, the Director submitted a report to the County Commissioners providing additional information regarding his reasons for the denial of the exemption request. Specifically, the Director relied on a 1965 zoning map as evidence that the Gross Project was not within the Flood Regulatory Area zone as of May 17, 1974, because the property underlying the Gross Project was not depicted on the map.

21. The appeal hearing took place during a public meeting on March 14, 2019. During the hearing, Denver Water explained that the 1965 map is not dispositive of whether the Gross Project was within the Flood Regulatory Area zone as of May 1974 for two reasons.

22. First, in 1970 the State Water Conservation Board adopted a resolution designating and approving as flood hazard areas the areas described in a 1969 US Army Corps of Engineers report as being inundated by an intermediate regional flood. The report included a general description of the land upon which the Gross Project is located, as well as its role in reducing peak flood flows on South Boulder Creek. Pursuant to the applicable law, including the pertinent zoning resolution, the Gross Project was within in the flood regulatory area zoning prior to May 17, 1974. Amendment to the County's 1965 Zoning Resolution, Approved August 11, 1969, Section 18.5, 3.1.

23. Second, property does not have to be actually depicted on a map in order to be included within the flood zone—the applicable regulation states that "[t]he Flood Regulatory Area shall *include* the area delineated on the maps and profiles...," but *it does not limit* the application of the zoning only to the areas depicted on maps and profiles. *Id*. at 3.2 (emphasis provided).

24. The report also stated that even if the land was in the Flood Regulatory Area, "any use enumerated in [Section 18.5]" would have required additional Planning Commission review and approval, which never occurred. In response, Denver Water explained that the Zoned Land Exemption requires only that the land "has been **zoned**" for the contemplated use. C.R.S. § 24-65.1-107(1)(c)(II) (emphasis provided). And, therefore, whether additional process was required

is not determinative of the applicability of the Zoned Land Exemption.

25. Denver Water also addressed a potential Director's argument that even if the dam was permitted as a use by right, the reservoir was not—it would have been meaningless to allow dams without allowing water to be stored behind them. While the applicable zoning code did not separately zone for reservoirs, the essential function of a dam is to impound water. Thus, the only logical reading of the code is that by allowing dams in the flood regulatory area, an authorization to store water upstream of the dam was intended.

26. Finally, Denver Water revisited one of the Director's previous arguments that the Gross Project was not included in the Flood Regulatory Area zone, because a portion thereof was outside of such zone. Denver Water explained that although the zoning code in effect at the time did not expressly address structures that are part-in/part-out of an overlay area, part of the existing and enlarged dam structure will be located inside of the existing floodplain and part of it outside. Otherwise, the dam would not function. Therefore, to give effect to the intent of the 1969 Amendment to the County's 1965 Zoning Resolution, it should be read that the Flood Regulatory Area zone includes and applies to the entire structure even if a part of it is outside of such zone. The current zoning code expressly addresses this situation. Specifically, section 4-402 of the LUC makes clear that if a building or structure lies partly within the Floodplain Overlay District, then the Floodplain Overlay District provisions apply to the entire building or structure.

27. Following the presentations by Denver Water and the Director, as well as extensive public comment, the Commissioners affirmed the Director's decision by a unanimous voice vote on March 14, 2019.

FIRST CLAIM FOR RELIEF
(C.R.C.P. 106(a)(4) - Abuse of Discretion/Exceeding Jurisdiction)

28. Denver Water incorporates by reference paragraphs 1 through 27 as if fully set forth herein.

29. Judicial review may be requested under C.R.C.P. 106(a)(4) "where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law."

30. The scope of a C.R.C.P. 106(a)(4) review is whether the governmental body's decision was an abuse of discretion or was made in excess of its jurisdiction, based on the evidence in the record before that body. C.R.C.P. 106(a)(4)(I); *Verrier v. Colo. Dep't of Corr.*, 77 P.3d 875, 879 (Colo. App. 2003); *see also Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶ 9, 297 P.3d 1052, 1055. An agency's misinterpretation or misapplication of governing law may constitute an alternative ground for finding an abuse of discretion under C.R.C.P. 106(a)(4). *See Roalstad v. City of Lafayette*, 2015 COA ¶ 13, 363 P.3d 790, 793. The Court may defer to a government body's construction of the code, as long as it is reasonable; however, it is not bound by it, since Court's

review of such code provisions is de novo. *See City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008).

31. The Commissioners acted in a quasi-judicial capacity when they heard and decided Denver Water's appeal of the Director's decision at a public hearing conducted for this purpose pursuant to Article 8, §§ 8-208 and 8-406 of the LUC. *See e.g., Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622, 625 (Colo. 1988).

32. The Commissioners' approval of the Director's October 22 decision is a final decision on whether Denver Water is required to apply to the County for a 1041 permit for the Expansion. As a result of the Commissioners' decision, Denver Water must either obtain the permit or the Expansion may not proceed. Other than review by this Court, Denver Water has no plain, speedy and adequate remedy to the Commissioners' actions.

33. The Commissioners have exceeded their jurisdiction and/or abused their discretion during the hearing, including by failing to consider evidence in the record before them and by misinterpreting and/or misapplying the governing law.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment Pursuant to C.R.C.P. 57 & Uniform Declaratory Judgments Law, C.R.S. § 13-51-101, *et seq*.)

34. Denver Water incorporates by reference paragraphs 1 through 33 as if fully set forth herein.

35. Pursuant to C.R.C.P. 57 and the Uniform Declaratory Judgments Law, this Court has a general power to issue a declaratory relief, where such relief will terminate the controversy or remove an uncertainty with respect to any person's rights, status, or other legal relations.

36. Denver Water seeks this Court to interpret the provisions of C.R.S. § 65.1-107(1)(C)(II), 1969 and 1972 Amendments to the County's 1965 Zoning Resolution, and the 1970 State Water Conservation Board's Resolution and to enter a declaratory judgment that, among other things: the dam was in the flood regulatory area as of May 17, 1974; if the dam was exempt as a use by right as of May 17, 1974, so was the reservoir; land does not have to be actually depicted on a map in order to be included within the flood zone and that, instead, a general description of the property underlying the Gross Project in the 1969 US Army Corps of Engineers report, adopted by the Colorado State Water Conservation Board in 1970, would be sufficient; the Zoned Land Exemption applies to the Expansion; and Denver Water is not required to obtain from the County a 1041 permit for the Expansion.

37. A judgment or decree by this Court, if rendered or entered on these issues, would end the uncertainty, insecurity, and controversy with respect to the rights, status, or other legal relations between the parties.

38. Resolution of this matter in a rapid manner is essential as further delay on this

matter will cause greater prejudice and injury to Denver Water. Accordingly, pursuant to Colo. R. Civ. P. 57(m), Denver Water requests that the Court advance this case on the Court's calendar.

PRAYER FOR RELIEF

WHEREFORE, Denver Water respectfully prays for judgment against the County upon each and all of the claims for relief, including and without limitation:

1. On the First Claim for relief a determination that:
   a. the County Commissioners have exceeded their jurisdiction and/or abused their discretion during the hearing, including by failing to consider evidence in the record before them and by misinterpreting and/or misapplying the governing law; and
   b. the Expansion is exempt from the requirements of Section 8-401(D) of the Boulder County's Land Use Code pursuant to the Zoned Land Exemption, C.R.S. §24-65.1-107(1)(c)(II).

2. On the Second Claim for relief, a declaration of Denver Water's rights and obligations with respect to the 1041 permit for the Expansion in accordance with the proof and pursuant to applicable law;

3. On all claims: an award of reasonable attorney fees, costs, and expenses incurred in this action; prejudgment or moratory interest in accordance with law; and such other and further relief as the Court deems just and proper under the circumstances.

DATED this 11th day of April 2019.

Respectfully submitted,

JESSICA BRODY, GENERAL COUNSEL

By: *_/s/ Tatiana G. Popacondria_____*
Tatiana G. Popacondria, No. 42261
Jessica Brody, No. 35264

Pursuant to C.R.C.P. 121, § 1-26(7), a printed copy of this document with original signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request.

Plaintiff's Address:
Board of Water Commissioners
1600 West 12th Avenue
Denver, Colorado 80204

Exhibit 2

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3744	DATE FILED: December 27, 2019 CASE NUMBER: 2019CV30350
Plaintiff-Appellant: THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, a municipal corporation of the State of Colorado, v. **Defendant-Appellee:** BOULDER COUNTY, ACTING BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS, a body corporate and politic of the State of Colorado, and DEB GARDNER, ELISE JONES, and MATT JONES, in their official capacity. **Defendant/Intervenors:** THE ENVIRONMENTAL GROUP AND SAVE THE COLORADO	▲ **COURT USE ONLY** ▲
Attorney for Plaintiff: Jessica R. Brody and Tatiana G. Popacondria *Attorney for Defendant – Appellee:* BOULDER COUNTY ATTORNEY Deputy County Attorney: David Hughes, Assistant County Attorney: Jasmine Rodenburg *Attorney for Defendant Intervenors:* John M. Barth	Case Number: **2019CV30350** Division 3 Courtroom R
RULING AND ORDER	

This matter comes before the Court on The City and County of Denver's Board of Water Commissioners' ("Denver Water") C.R.C.P. 106(a)(4) claim against the Boulder County Board of County Commissioners' ("BOCC") regarding their decision to exercise permitting authority and to retain regulatory control over Denver Water's proposed expansion of Gross Dam and Gross Reservoir. Having carefully considered the briefs, record, and applicable law, the Court enters the following ruling and order:

I. BACKGROUND

The historical background of this case dates back to the 1940s, when Denver Water acquired a site in Boulder County upon which to construct and operate a dam and a reservoir (the

"Original Gross Project"). This site is known as Gross Dam and Gross Reservoir. The purpose of the Original Gross Project was to "store water from South Boulder Creek and the Fraser River Basin for treatment and delivery within [Denver Water's] service area." Pl.'s Complaint at 2. At the time it designed Gross Dam, Denver Water intended on constructing the dam in multiple phases to allow for future expansions that would meet future water needs. *Id.* The Dam was completed pursuant to a license in 1955. *Id.*

In the early 2000s, Denver Water determined that additional storage capacity was necessary to meet the demands of Denver's growing population. *Id.* After conducting a comprehensive study, Denver Water determined that expanding Gross Dam, and thereby Gross Reservoir, was the best option to satisfy Denver's ever-growing need for additional water. *Id.* at 2-3. After the conclusion of the evaluation, Denver Water decided to raise Gross Dam by 131 feet to a height of 471 feet, which will have the effect of expanding the storage capacity of Gross Reservoir from 41,811 acre-feet to about 119,000 acre-feet (the "Expansion Project"). *Id*. at 3, R. at 000133-000162.

On October 12, 2018, Denver Water sent a letter to Boulder County's Director of Land Use ("Director Case"), requesting a determination as to whether Boulder County's 1041 Regulations, located in Articles 8-200 through 8-600 of the Boulder County Land Use Code ("LUC"), require Denver Water to obtain a permit from the County before it could expand Gross Dam and Reservoir. Denver Water asserts that the Expansion Project is exempted from Boulder County's Land Use regulatory process and that it does not require a permit to expand Gross Dam and Gross Reservoir. Denver Water asserts that it is exempt because Colorado's Areas and Activities of State Interest Act ("H.B. 1041") provided an exemption for any development or activity that as of May 1974 "has been zoned by the appropriate local government for the use contemplated by such development or activity." §24-65.1-107(1)(c)(II), C.R.S. (hereinafter the "Zoned Land Exemption"). R. at 000012-15.

Director Case denied Denver Water's request to be exempted from Boulder County's Land Use regulatory process. Director Case asserted that the Zoned Land Exemption did not apply to the Gross Dam Expansion Project because: (a) Gross Dam was located in a zoning district that did not permit dams and reservoirs as permitted uses in 1974; (b) Gross Dam was not located within a Flood Regulatory Area; and (c) the Zoned Land Exemption requires Planning Commission review and approval prior to development, which has not taken place. R. at 000016-17.

Denver Water subsequently filed an appeal requesting reconsideration of Director Case's denial. The Boulder County Board of County Commissioners (the "BOCC") subsequently held a public hearing on Denver Water's appeal. BOCC unanimously voted to affirm Director Case's decision. R. at 000005, 000008-10. Denver Water again appealed seeking this Court's review under C.R.C.P. Rule 106(a)(4) of the BOCC's decision that it has permitting authority under H.B. 1041.

II. ISSUE ON APPEAL

Whether the BOCC exceeded its authority or abused its discretion, or misapplied or misinterpreted the law, in determining that the Zoned Land Exemption of H.B. 1041 does not apply to the Expansion Project?

III. STANDARD OF REVIEW

Pursuant to the Colorado Rules of Civil Procedure Rule106(a)(4), when a governmental body or agency exercising judicial or quasi-judicial functions exceeds its jurisdiction or abuses its discretion, "[r]eview shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record." If the reviewing Court determines that the governmental body "failed to make findings of fact or conclusions of law necessary for a review of its action, the Court may remand for making of such findings of fact or conclusions of law." Rule106(a)(4)(IX), C.R.C.P.

In order to prove a governing body abused its discretion, a party challenging a local governmental agency's decision must prove that no competent evidence exists in the record to support the agency's action. *Van Sickle v. Boyes*, 797 P .2d 1267, 1272 (Colo. 1990). 'No competent evidence' means the decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* Review of an agency decision under C.R.C.P. 106(a)(4) is limited to matters contained within the record of the proceeding before the agency, and the the challenging party has the burden to overcome the strong presumption that the agency's actions were proper. *See IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008).

Further, any "reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *Van Sickle*, 797 P .2d at 1272. If competent evidence supports the agency's decision, then "[t]here is no showing of an abuse of discretion, even in the face of conflicting evidence on some points" and the decision must be therefore upheld. *Corper v. City of Denver*, 552 P.2d 13, 17 (Colo. 1976).

H.B. 1041 became effective on May 17, 1974 with the intent that land use, land use planning, and quality of development become matters with which the state "has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state." §24-65.1-101(c), C.R.S. H.B. 1041 authorized local governments to designate areas and activities which may be of state interest and establish criteria for those local governments to regulate such areas and activities through their respective zoning codes. §24-65.1-101(2)(a), C.R.S. The enactment of land use controls or decision to enforce those regulations however, must bear a *rational relationship* to the health, safety, and welfare of the community." *Tri-State Generation and Transmission Ass'n v. Board of County Com'rs of Lincoln County*, 600 P.2d 103, 104 (Colo. App. 1979) (emphasis added).

To enact such zoning codes, local governments initially create specific zoning districts, then subsequently define which specific permitted or conditional uses are allowed within each zoning district. *City of Colo. Springs v. Securcare Self Storage Inc.*, 10 P.3d 1244, 1247 (Colo. 2000). A *permitted* use is defined as "any use of land or a structure which is allowed by right in a

zone district and subject to the requirements of that district." *Id.* at 1247-1248 (emphasis added). A *conditional* use is "[a] land use which is contemplated with the permitted uses in a zone district but has operating and/or physical characteristics which require careful consideration and public review of the impact upon the neighborhood and the public facilities surrounding the proposed location." *Id.* at 1248. (emphasis added).

Once a local government has designated an area or activity of state interest and proclaimed permitting authority over such area or activity, "any person desiring to engage in development in an area of state interest or to conduct an activity of state interest shall file an application for a permit with the local government in which such development or activity is to take place." § 24-65.1-501(1)(a), C.R.S. After an application for a permit is submitted to the proper local government, the local government has the permitting authority to approve the application so long as the proposed development "complies with the local government's guidelines and regulations governing such area." § 24-65.1-501(3), C.R.S. If the proposed development fails to comply, the local government shall deny the permit. *Id.* Any denial of an application for a development permit by a local government is thereafter subject to judicial review in the District Court in the same judicial district. § 24-65.1-502, C.R.S. A reviewing court only has the power to intervene in a local government's exercise of its land use permitting authority and regulatory power when such power is exercised "capriciously and arbitrarily." *Tri-State Generation and Transmission Ass'n v. Board of County Com'rs of Lincoln County*, 600 P.2d 103, 104 (Colo. App. 1979).

The BOCC determined that the expansion of existing reservoirs is an activity of state interest. To regulate this activity of state interest, Boulder County's H.B. 1041 regulations require a permit from the County before any "[e]xpansion of any existing reservoir for a municipal or domestic treated water use." § 8-401(D)(2019), LUC.

H.B. 1041 created an exemption that provides for bypassing local government permitting authority in the development of land "zoned by the appropriate local government for the use contemplated by such development" before H.B. 1041 became effective. § 24-65.1-107(1)(c)(II), C.R.S.

IV. ANALYSIS

In the instant case, Denver Water has the burden of proving that the BOCC exceeded its authority or abused its discretion in its decision to deny Denver Water's request to be exempted from the LUC's regulatory process in its construction of the Expansion Project. Before the Court can determine whether the BOCC exceeded its authority or abused its discretion, the Court must first look at the statutory intent behind the 1974 Zoning Resolution and the Zoned Land Exemption. *City of Colo. Springs v. Securcare Self Storage Inc.*, 10 P.3d 1244, 1248-49 (Colo. 2000) (A court tasked with interpreting a statute or ordinance is required to "ascertain and give effect to the intent of the legislative body").

The Zoned Land Exemption applies when "[t]he development is to be on land…which has been zoned by the appropriate local government for the use contemplated by such development or activity." §24-65.1-107(1)(c)(II), C.R.S. Denver Water claims that the Boulder County Zoning Resolution in effect at the time H.B. 1041 was enacted (May 17, 1974) allowed for the use of

Gross Dam and Reservoir. R. at 000012-15. It is undisputed that the Expansion Project is located in the Forestry District as has been the case prior to and as of May 17, 1974. R. at 000039. Boulder County asserts that the Expansion Project does not qualify for the Zoned Land Exemption because the subject property was not zoned for use as a dam and reservoir. Boulder County asserts that it did not have dam or reservoir zoning in place in 1974 making the Zoned Land Exemption inapplicable. Denver Water counters that while the Forestry District did not expressly authorize dams in 1974, it did not expressly prohibit them. Combined Reply Br. at 2. Denver Water further argues that in 1969 Boulder County amended their Zoning Resolution regarding the Flood Regulatory Area to authorize dams. Section 18.5(3.4) provides that dams "shall be permitted within the Flood Regulatory Area to the extent that they are not prohibited in a particular area by any underlying zoning category." Boulder County Zoning Resolution § XVIII(18.5)(3.4) (1974). R. at 000091. At the time the Zoned Land Exemption was implemented into the 1974 Zoning Resolution, Boulder County's Forestry Zoning District did not specify reservoirs and dams as permitted uses. Denver Water asserts that the Zoned Land Exemption of 1974 applies to the Gross Dam Expansion Project because, "[t]he Forestry District did not expressly prohibit dams." Pl.'s Opening Br. at 15. Boulder County asserts that if a use is not listed in the regulations as permitted in that zoning district, then the use is prohibited in that zoning district. Def.'s Response Br. at 3, R. at 000031.

Boulder County asserts that because it is undisputed that as of May 17, 1974, the Gross Reservoir and Gross Dam was zoned in the Forestry District and that dams and reservoirs were not permitted that the court should uphold the BOCC decision that the Expansion Project is not subject to the Zoned Land Exemption. Denver Water, however, asserts that the Flood Regulatory Area provisions of Boulder County's Zoning Resolution authorized dams and that the court should find this use was thereby permitted in the Forestry District.

The court will first address whether the Gross Dam area falls within the Flood Regulatory Area under the Colorado Water Conservation Board's (CWCB's) 1970 Resolution regarding the South Boulder Creek floodway. The Flood Area Regulatory Provision applies to lands within the 100-year flood plain that are mapped and designated." Boulder County Zoning Resolution § XVIII(18.5)(2.4) (1974), R. at 000089. It is undisputed that Boulder County designated and mapped the 100-year flood plain for South Boulder Creek based on the provisions adopted by the Colorado Water Conservation Board. CWCB's 1970 Resolution was specifically based on the data and information found in the Army Corps of Engineers' 1969 Report and the USACE Report. The USACE Report incorporated the areas mapped and designated by the Army Corps of Engineers. It is clear from the record that the Army Corps of Engineers' 1969 Report mapped and designated the flood plain along South Boulder Creek only as far upstream as Eldorado Springs. R. at 000011, 001263. The Court notes that the USACE Report did mention Gross Dam, but only in regard to the flood-control benefits the Dam coincidentally provided by reducing peak flows on South Boulder Creek. R. at 001263, 001271. After a thorough review of the record the Court finds that the USACE Report does not map or designate Gross Dam and Gross Reservoir within the 100-year flood plain. Eldorado Springs is notably seven miles downstream from Gross Dam and Gross Reservoir. The Court finds ample support in the record that Gross Dam was not mapped and designated within the flood plain zone of South Boulder Creek in the Army Corps of Engineers' 1969 Report. Therefore, even if the 1969 Flood Area Regulatory Area Provision permitted dams and reservoirs in the Forestry District, the BOCC did not exceed its jurisdiction or abuse its

authority when it found that the Zoned Land Exemption did not apply to the proposed Expansion Project.

The Court finds that the BOCC made sufficient findings of fact and conclusions of law that are supported by competent evidence in the record of its proceedings. Denver Water did not meet its burden of showing that the BOCC's actions were not proper. Denver Water points the court to the Flood Plain Information Report in the record as support for its assertion that "[t]he Report thus necessarily accounted for the existence of an upstream dam in calculating boundaries of the downstream area affected by the flood." Denver Water cites the Record at 001263 and at 001271 as support for this assertion. Combined Reply Br. at 7-8, footnote 3. The Court has reviewed the Record 001263 and at 001271 and finds no support that Gross Reservoir or Gross Dam was mapped or analyzed in the USACE Report.

The Court finds that the record supports both Director Case and the BOCC's conclusion that "even if the project was in the Flood Regulatory Area, the zoning under parts 3.4 and 3.5 Section 18.5 of the 1974 regulations stated: "Any use enumerated in this section may be permitted only upon an application to the Zoning Administrator and the issuance of a special permit by the Planning Commission…The required Planning Commissioner review required a public hearing. The county has no evidence that any such review or hearing took place regarding the project. Thus, the development or activity was not zoned for such use as the development did not have Planning Commission approval." R. at 000010, R000091. Denver Water failed to meet its burden of showing any evidence that this finding is in error.

There is nothing in the record that indicates Denver Water had any well-established development rights to expand Gross Dam and Gross Reservoir prior to May 17, 1974. Any prior contemplated expansion projects cannot be determined to be well-established development rights because the proposed Expansion Project is essentially an entirely new construction project. BOCC argues that it would have significant impacts on Boulder County residents and the environment. BOCC asserts that the Expansion Project would "be the largest construction project ever in Boulder County." Def.'s Answer Br. at 2. The Court finds that the Expansion Project is subject to Boulder County's permitting authority and regulation process.

V. DENVER WATER'S SECOND CLAIM FOR RELIEF

Denver Water's Second Claim for Relief is for Declaratory Judgment Pursuant to C.R.C.P. 57 and the Uniform Declaratory Judgments Law, C.R.S. § 13-51-101, *et seq.* The Court has thoroughly reviewed the evidence in the record and finds that the BOCC did not misinterpret or misapply governing law in reaching its decision. The Court has reviewed and interpreted the provisions of C.R.S. § 24-65.1- 107(1)(c)(II), the 1969 and 1972 Amendments to Boulder County's 1965 Zoning Resolution, and the 1970 Colorado Water Conservation Board's Resolution. In accordance with the foregoing analysis, the Court finds: (a) Gross Dam was located in a zoning district that did not permit dams and reservoirs as permitted uses as of May 17, 1974; (b) Gross Dam and Gross Reservoir were not mapped and designated in the Flood Regulatory Area of South Boulder Creek and were therefore not located within a Flood Regulatory Area; (c) the Expansion Project is not subject to the Zoned Land Exemption of H.B.

1041; and (d) the Expansion Project requires Planning Commission review and approval prior to development.

VI. CONCLUSION

The Court finds that based on the evidence in the record the BOCC did not exceed its jurisdiction or abuse its discretion, or misinterpret or misapply the law, when it asserted its permitting authority pursuant to 1041 to maintain regulatory control over Denver Water's proposed expansion of Gross Dam and Gross Reservoir.

SO ORDERED this 27th day of December, 2019.

BY THE COURT:

Andrew R. Macdonald

Andrew R. Macdonald
District Court Judge

Exhibit 3

DATE FILED: February 7, 2020 11:23 AM
FILING ID: B300DE997A35C
CASE NUMBER: 2019CV30350

COURT OF APPEALS
STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue
Denver, Colorado 80203

Appeal from the Boulder County District Court
Honorable Andrew R. Macdonald, District Court Judge
Civil Action No. 2019CV030350

Plaintiff/Appellant: THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, a municipal corporation of the State of Colorado,

v.

Defendants/Appellees: BOULDER COUNTY, ACTING BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS, a body corporate and politic of the State of Colorado, and DEB GARDNER, ELISE JONES, and MATT JONES, in their official capacity.

Defendant Intervenors/Appellees: THE ENVIRONMENTAL GROUP and SAVE THE COLORADO.

▲ **COURT USE ONLY** ▲

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Case No.:

NOTICE OF APPEAL

Appellant the City and County of Denver, acting by and through its Board of Water Commissioners ("Denver Water"), hereby files this Notice of Appeal.

I. NATURE OF THE CASE

A. Nature of the Controversy

In this case, Denver Water is challenging the Boulder County Board of County Commissioners' ("Boulder County") decision that it has permitting authority over Denver Water's Gross Dam Expansion Project under Colorado's Areas and Activities of State Interest Act ("H.B. 1041"). Denver Water contends that the Expansion Project is exempt from Boulder County's authority under the zoned land exemption to H.B. 1041.

B. Order Being Appealed and Basis for Appellate Jurisdiction.

Denver Water appeals the district court's December 27, 2019 Ruling and Order denying Denver Water's C.R.C.P. 106(a)(4) and 57 claims against Boulder County.

The Colorado Court of Appeals has jurisdiction pursuant to C.R.S. § 13-4-102(1), C.R.S. § 24-4-106(9), and C.A.R. Rule 4(a)(1).

C. Resolution of Issues

The order on appeal resolved all issues pending before the district court.

D. Finality of Order

The order was made final for purposes of appeal pursuant to the court's order of December 27, 2019.

E. Date of Entry and Service.

The order on appeal was entered on December 27, 2019. Date of mailing: the order was electronically served on December 27, 2019.

F. Extensions for Filing Motions for Post-Trial Relief.

None.

G. Motions for Post-Trial Relief.

None.

H. Date of Denial of Motion for Post-Trial Relief.

Not applicable.

I. Notice of Intent

Pursuant to C.R.S. § 24-4-106(9), Plaintiff/Appellant is filing a Notice of Intent to Seek Appellate Review in the district court concurrently with the filing of this Notice of Appeal.

J. Extensions for Filing Notice of Appeal.

None.

II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

The following issues may be raised on appeal by Appellant:

(1) Whether the district court erred in concluding that Boulder County did not exceed its jurisdiction or abuse its discretion, or misinterpret or misapply the law or its own ordinances, when it asserted its permitting authority pursuant to H.B. 1041 to maintain regulatory control over the Expansion Project.

(2) Whether the district court erred in reviewing Boulder County's decision under a deferential standard of review when the legal issues in this case involve interpretation of state statutes and state agency actions that are beyond Boulder County's jurisdiction to interpret.

(3) Whether the district court erred by finding that (a) Gross Dam was located in a zoning district that did not permit dams and reservoirs as permitted uses as of May 17, 1974; (b) Gross Dam and Gross Reservoir were not mapped and designated in the Flood Regulatory Area of South Boulder Creek and were therefore not located within a Flood Regulatory Area; (c) the Expansion Project is not subject to the Zoned Land Exemption of H.B. 1041; and (d) the Expansion Project requires Planning Commission review and approval prior to development.

III. NECESSITY OF TRANSCRIPT

No transcript is necessary because no evidentiary hearings or oral arguments were held.

V. COUNSEL FOR PARTIES

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VI. APPENDIX

An appendix containing a copy of the district court's December 27, 2019 order is attached hereto as Exhibit A.

Respectfully submitted this 7th day of February 2020.

JESSICA BRODY, GENERAL COUNSEL

s/ Nicholas A. DiMascio

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2020, a true and correct copy of the foregoing **NOTICE OF APPEAL** was filed and served via Colorado Courts E-Filing upon counsel of record and the following:

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Clerk of the Court
District Court, Boulder County, Colorado
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s/ Allecia Cavallaro
Allecia Cavallaro, paralegal

Exhibit 4

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 10, 2020 CASE NUMBER: 2020CA253
Boulder County 2019CV30350	
Plaintiff-Appellant: City and County of Denver, acting by and through it's Board of Water Commissioners, a municipal corporation of the State of Colorado, **v.** **Defendants-Appellees:** Boulder County, acting by and through it's Board of County Commissioners, a body corporate and politic of the State of Colorado; Deb Gardner; Elise Jones; and Matt Jones; **Intervenors-Appellees:** Environmental Group and Save the Colorado.	Court of Appeals Case Number: 2020CA253
MANDATE	

This proceeding was presented to this Court on appeal from Boulder County.

Upon consideration thereof, the Court of Appeals hereby ORDERS that the **APPEAL** is **DISMISSED with prejudice**.

POLLY BROCK
CLERK OF THE COURT OF APPEALS

DATE: AUGUST 10, 2020